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Supreme Court, U.S.
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No. 04-1015

IN THE

Supreme Court of the United States

MICHAEL JOHNSON,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF INDIANA

AMICUS CURIAE BRIEF OF DEAN EMERITUS NORMAN LEFSTEIN IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The interest of *Amicus Curiae* (hereafter *amicus*) derives from his many years of professional interest and service - as a law school dean, law professor, and practicing defense attorney - in the quality of representation furnished to the indigent accused in criminal cases. *Amicus* is Dean Emeritus and Professor of Law at Indiana University School of Law - Indianapolis. *Amicus* currently chairs the American Bar Association's Indigent Defense Advisory Committee, which seeks to improve defense services for the poor nationwide, and chairs the Indiana Public Defender Commission. *Amicus* was the Reporter for the American Bar Association's *Standards for Criminal Justice Relating to the Prosecution Function, The Defense Function,* and *Providing Defense Services* (2d ed. 1979), and chaired the ABA Task Force that oversaw the preparation of the third edition of these chapters, which were published in 1993.[2]

In addition to serving as Director of the District of Columbia Public Defender Service during the 1970's, *amicus* has published scholarly material regarding indigent defense services, and often has been qualified as an expert witness

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[1] Pursuant to S.Ct. Rule 37.6, *amicus* discloses that he is the author of this brief, although he received assistance from his counsel, John R. Maley, who is also counsel for Petitioner. *Amicus* prepared the brief *pro bono.* Petitioner's counsel and/or his firm are providing the sole monetary contribution for printing this brief. Petitioner and Respondent have consented in writing to this *amicus* brief and their letters of a consent are being lodged herewith.

[2] This brief is filed by the *amicus* as an individual. The brief is not submitted on behalf of the Indiana Public Defender Commission nor the American Bar Association committee that *amicus* chairs.

in federal and state courts concerning effective defense representation and systems for providing defense services. Most recently, *amicus* co-authored *Gideon's Broken Promise: America's Continuing Quest for Equal Justice,*[3] an in-depth report from the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants based on analysis and national hearings regarding criminal defense for those unable to afford counsel. This report was released by the ABA on February 11, 2005.

SUMMARY OF ARGUMENT

This Petition presents important issues of federal constitutional law that should be addressed and settled by this Court, including the extent to which a defense lawyer must prepare a defendant to testify at his trial, whether the decision to testify must genuinely be made by the defendant, the extent to which the trial court should inquire of defendant whether he has made a conscious decision to waive his constitutional right to testify, and whether this decision has been made in consultation with counsel. Defendants in criminal cases have the constitutional right to testify on their own behalf, but that right is infringed if defense counsel fails to prepare them to testify. Because many public defender offices in this country are inadequately funded, understaffed, and overburdened, Petitioner is unfortunately not alone in being denied his right to testify through ineffective assistance. This Court should grant the Petition to confirm that the Sixth Amendment requires defense counsel to prepare the defendant to testify so that defendant can make an informed

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[3] American Bar Association, December 2004, available at www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

decision whether to testify and have the benefit of counsel's assistance in doing so.

ARGUMENT

This case presents issues of great public importance that should be addressed by this Court. Although the case may appear at first blush to simply be a disputed murder case in which the wrong suspect appears to have been convicted and sentenced to 60 years, it actually presents a critical constitutional issue concerning the duties of criminal defense lawyers in representing their accused clients. This matter is therefore a prime opportunity for this Court to underscore the importance of preparing a defendant to testify in criminal cases.

The Court has emphasized that the "goal" in providing counsel "is ... to ensure that defendants receive a fair trial." *Strickland v. Washington*, 466 U.S. 668, 689 (1983). Unfortunately, in this country's strained public defense system, many defendants like Petitioner are deprived their fair trial due to ineffective assistance of counsel. Here, Petitioner was denied his constitutional right to testify. *Rock v. Arkansas*, 483 U.S. 44, 46 (1987) (in confirming the constitutional right to testify to be a fundamental right, the Court writes, "In fact, the most important witness for the defense in many criminal cases *is the defendant himself*") (emphasis added); *Riggins v. Nevada*, 504 U.S. 127, 144 (1992) ("the defendant has the right to testify on his own behalf, a right we have found essential to our adversary system").

In a larger sense, this case typifies much of what is wrong with indigent defense representation in many states, as

detailed in the American Bar Association's recent 76-page report entitled, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice.*[4] Public defenders and others who provide defense representation sometimes find it exceedingly difficult to devote the necessary time to do what is required of them in defending their clients.[5] As a result, the goal of securing defense services for the indigent comparable to representation provided to persons of financial means is an unrealized hope. Because of this, innocent persons are sometimes convicted,[6] which is quite possibly what happened to the Petitioner, Michael Johnson, because his case simply was not sufficiently prepared for trial.

Indeed, this case is simple and undisputed on its facts: the public defender was not prepared for trial, and did not prepare Petitioner to exercise his constitutional right to testify. At the very least, his constitutional right to a fair trial has been violated, but unfortunately a divided 3-2 Indiana Supreme Court did not grant review to correct this injustice.

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[4] American Bar Association, December 2004, available at www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf.

[5] *See, e.g.*, U.S. Dept. of Justice, *Keeping Defender Workloads Manageable*, (2001), which observes that "[e]veryday, defenders try to manage too many clients. Too often the quality of representation suffers. . . ."

[6] There is a significant body of literature documenting the dimension of the wrongful conviction problem in America's criminal courts involving both capital and non-capital cases. *See, e.g.*, *Wrongly Convicted: Perspectives on Failed Justice* (Saundra D. Westervelt & John A. Humphrey eds., 2001); Daniel Giveleber, *Meaningless Acquittals, Meaningful Convictions: Do We Really Acquit the Innocent*, 49 Rutgers L. Rev. 1317 (1997).

Petitioner's tragic plight is not, unfortunately, an isolated occurrence. The insights, studies, and experiences of *amicus* throughout his career, as well as reported decisions around the country, confirm that the failure to prepare defendants to testify is a serious issue in this country.

In *Perrero v. State*, 990 S.W.2d 896, 899 (Tex. Ct. App. 1999), for instance, defense counsel was held to be ineffective for failing to adequately prepare the defendant before he testified. The court explained:

> Mr. Perrero described the entire process of deciding whether or not he would testify as being a split second decision. "After the state presented all their witnesses Mr. Hill [trial counsel] turned to me and asked me if I would care to get on the stand. And I told him I didn't know, and he said, 'Well, do you feel like doing it?' And I said, "I guess so'."

Id. at 899. In ordering a new trial, the Texas Court of Appeals concluded, "In this case, trial counsel's failure to properly prepare Mr. Perrero for his testimony was both ineffective and extremely prejudicial, to the extent that it undermines our confidence in the outcome of the proceeding." *Id.* Similarly, in *People v. Smith*, 237 A.D.2d 388, 655 N.Y.S.2d 416 (N.Y. S.Ct. 1997), the failure to prepare defendant to testify contributed to ineffective assistance of counsel.

Similarly, in *Turner v. Duncan*, 158 F.3d 449 (9th Cir. 1998), the court wrote:

> Smyth's failure to adequately consult with and prepare his client to testify did not meet the

> standard of competent representation. . . . Counsel's admission that he spent at most forty-five minutes with Turner prior to trial demonstrates deficient performance. . . . Smyth's cursory consultation is especially shocking in light of the seriousness of the charges against Turner, the fact that the entire defense hinged on Turner's intent and mental state, and that Turner testified in a manner that suggests he was wholly unprepared to answer questions on cross-examination.

Id. at 457.

Similarly, in *State v. Graham*, 906 S.W.2d 771, 786 (Mo. Ct. App. 1995), the court wrote, "The defendant made the decision [to testify], but the defendant was entitled to reasonably competent advice in making the decision." *Id., vacated, in part, on other grounds* at 969 S.W.2d 759 (Mo. Ct. App. 1998). In *Magbual v. State*, 2000 Haw. App. LEXIS 147, *26 (Haw. Ct. App. 2000), the court wrote that "if defense counsel fails to perform sufficient preparation and investigation to be able to adequately advise a defendant whether or not to testify, e.g., by failing to ascertain the full scope of a defendant's possible testimony, this could constitute a 'lack of diligence' amounting to ineffective assistance of counsel."

Moreover, this Court recently noted that an attorney must consult with an accused regarding his right to testify. In *Florida v. Nixon*, 2004 U.S. LEXIS 8270, 125 S. Ct. 551, 560, (Dec. 13, 2004), the Court wrote:

> An attorney undoubtedly has a duty to consult with the client regarding 'important decisions,'

> including questions of overarching defense strategy. *Strickland*, 466 U.S. at 688. That obligation, however, does not require counsel to obtain the defendant's consent to 'every tactical decision.' *Taylor v. Illinois*, 484 U.S. 400, 417-418 (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client's approval). But certain decisions regarding the exercise or waiver of basic trial rights are of such moment that they cannot be made for the defendant by a surrogate. A defendant, this Court affirmed, has 'the ultimate authority' to determine 'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal.' *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Wainwright v. Sykes*, 433 U.S. 72, 93, n. 1 (1977) (Burger, C. J., concurring). Concerning those decisions, an attorney must both consult with the defendant and obtain consent to the recommended course of action.

125 S. Ct. at 560 (parallel citations omitted).

Notwithstanding this authority, Indiana has effectively determined that accuseds in Indiana do not have the right to be prepared to testify. Yet this important issue - the failure of defenders to prepare their accuseds to testify - is apparently so prevalent that some jurisdictions have instituted requirements that trial courts *voir dire* accuseds who do not testify to ensure their rights have been protected. *See, e.g., Momon v. State*, 18 S.W.3d 152 (Tenn. 1999). Most states, however, including Indiana, do not have this procedural requirement, so Petitioners such as Michael Johnson are left to the whims of often inexperienced, understaffed public

defenders. This Court can address and resolve this important constitutional issue by granting the Petition and determining that accuseds must be prepared by their counsel to testify, and when they fail to do so relief must be granted.

CONCLUSION

Amicus respectfully supports the Petition for a Writ of Certiorari so that the Court can address this important Sixth Amendment issue of ineffective assistance of counsel in failing to prepare accuseds to testify. Alternatively, if the Court were to determine not to exercise its discretionary jurisdiction to accept and hear this case on the merits to pronounce national guidance on this issue, given that Petitioner's constitutional rights were so clearly violated, the Court could and should simply direct the Indiana Court of Appeals to order a new trial so that Petitioner can receive the fair trial the Sixth Amendment and *Strickland* guarantee.

Respectfully submitted,

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